



PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Before The Board of Patent Appeals and Interferences

Applicant: Ian Baird Smith et al.

Serial No.: 09/445,043

Filing Date: March 20, 2000

Title: APPARATUS AND METHOD FOR
CLOSING OFF THE OPEN END
OF A CONTAINER WITH A
REMOVABLE FLEXIBLE
MEMBRANE COVERED BY A
RIGID CAP

Group Art Unit: 3727

Examiner: Robin Annette Hylton

Docket No: 350013-000065

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A handwritten signature in black ink, appearing to read "Ian Baird Smith", written over a horizontal line.

APPELLANT'S APPEAL BRIEF

Dear Sir:

In response to the Office communication dated January 11, 2008, Appellant submits this Appeal Brief to appeal the final rejections by Examiner Robin Annette Hylton. A request for a two-month extension of time accompanies this Appeal Brief.

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(1) REAL PARTY IN INTEREST

The present application is assigned to Lawson Mardon Sutton Ltd., a corporation organized and existing under the laws of the United Kingdom.

(2) RELATED APPEALS AND INTERFERENCES

There are no appeals or interferences related to the present case.

(3) STATUS OF CLAIMS

Claims 1, 3, 4, 6, 8-11, and 13 are pending and are herein appealed. Claims 2, 5, 7, 12, and 14-22 have been cancelled.

Claims 1, 3, 6, 9, 10, and 13 have been rejected pursuant to 35 U.S.C. § 102(b) as being anticipated by *Sekiguchi et al.*, Japanese Patent No. 62-122962.

Claim 8 has been rejected pursuant to 35 U.S.C. § 103(a) as being unpatentable over *Sekiguchi et al.*, Japanese Patent No. 62-122962.

Claim 11 has been rejected pursuant to 35 U.S.C. § 103(a) as being unpatentable over *Sekiguchi et al.*, Japanese Patent No. 62-122962, in view of *Hardt*, U.S. Patent No. 4,328,905.

Claims 1, 3, 4, 6, 8-10, and 13 have been rejected pursuant to 35 U.S.C. § 103(a) as being unpatentable over *Hiroshi*, Japanese Patent No. 6-219464, in view of *Sekiguchi et al.*, Japanese Patent No. 62-122962.

Claim 11 has been rejected pursuant to 35 U.S.C. § 103(a) as being unpatentable over *Hiroshi*, Japanese Patent No. 6-219464, in view of *Sekiguchi et al.*, Japanese Patent No. 62-122962, and further in view of *Hardt*, U.S. Patent No. 4,328,905.

(4) STATUS OF AMENDMENTS

No amendments have been filed that are presently pending decision.

(5) SUMMARY OF CLAIMED SUBJECT MATTER

The present invention generally relates to a container assembly comprising an open-ended container and a closure for the open-ended container, the closure comprising a flexible membrane. The various claims are directed toward the assembly wherein the general improvements over the prior art include, *inter alia*, providing an easy-open end to the container assembly permitting obtaining the contents of the can without the use of an opening device.

More specifically, Appellant's claim 1 recites an assembly comprising a closure for an open-ended container, and an open-ended container, the container assembly comprising: (i) a flexible membrane for closing the open end of the container (*see* Specification at ¶¶ 0014, 0034, 0043; Figs. 1 and 2)¹; (ii) an adhesive seal between the flexible membrane and the container (*see* Specification at ¶¶ 0015, 0040-42; Figs. 1 and 2); (iii) a rigid cap having a resiliently deformable member juxtaposed to the flexible membrane such that when the cap is in use, the flexible membrane is pressed against the container in the vicinity of the seal, thereby reinforcing the seal sufficiently to withstand high pressures which are generated from cooking the contents of the container (*see* Specification at ¶¶ 0016-17; 0050-51; Figs. 1 and 2); (iv) the rigid cap further having a first cam and follower pair, which when in use is engaged with a second cam and follower pair located on the container neck, relative movement between the first and second cam and follower pairs in a predetermined direction causes the rigid cap and the container neck to approach one another, thereby increasing the pressure exerted by the resiliently deformable member on the flexible membrane (*see* Specification at ¶¶ 0025; 0044; 0046; Figs. 1 and 2); and

¹ All citations to the specification are made to U.S. Publication 20020125249 by paragraph number where appropriate.

(v) the rigid cap further having a laminar member and an annular skirt, the skirt extending downwardly from the laminar member, and the second cam and follower pair is secured on an upper wall of the skirt, wherein the laminar member is spaced from the flexible membrane by a distance less than the maximum possible extension of the flexible membrane towards the laminar member (*see* Specification at ¶¶ 0045; 0048; 0053; Figs. 1 and 2).

(6) GROUND OF REJECTION TO BE REVIEWED ON APPEAL

The Office rejected claims 1, 3, 6, 9, 10, and 13 under 35 U.S.C. § 102(b) as being anticipated by *Sekiguchi et al.*, Japanese Patent No. 62-122962. In making this anticipation rejection, has the Office established a *prima facie* case of anticipation?

The Office rejected claim 8 under 35 U.S.C. § 103(a) as being unpatentable over *Sekiguchi et al.*, Japanese Patent No. 62-122962. In making this obviousness rejection, has the Office established a *prima facie* case of obviousness?

The Office rejected claim 11 under 35 U.S.C. § 103(a) as being unpatentable over *Sekiguchi et al.*, Japanese Patent No. 62-122962, in view of *Hardt*, U.S. Patent No. 4,328,905. In making this obviousness rejection, has the Office established a *prima facie* case of obviousness?

The Office rejected claims 1, 3, 4, 6, 8-10, and 13 under 35 U.S.C. § 103(a) as being unpatentable over *Hiroshi*, Japanese Patent No. 6-219464, in view of *Sekiguchi et al.*, Japanese Patent No. 62-122962. In making this obviousness rejection, has the Office established a *prima facie* case of obviousness?

The Office rejected claim 11 under 35 U.S.C. § 103(a) as being unpatentable over *Hiroshi*, Japanese Patent No. 6-219464, in view of *Sekiguchi et al.*, Japanese Patent No. 62-122962, and further in view of *Hardt*, U.S. Patent No. 4,328,905. In making this obviousness rejection, has the Office established a *prima facie* case of obviousness?

(7) ARGUMENT

A. *History of Prosecution*

Appellant filed this United States application containing claims 1-21 on March 20, 2000 as a national stage filing of international application number PCT/IB98/00825 dated May 28, 1998. Before the first Office Action on the merits, Appellant was required to elect claims for prosecution pursuant to a restriction requirement, and Appellant withdrew claims 19-21 from consideration without traverse. The first substantive Office Action addressing the merits of patentability was issued February 28, 2001, wherein the Office rejected pending claims 1-7 and 9-18 pursuant to 35 U.S.C. §§ 102(b); claims 8 and 11 pursuant to 35 U.S.C. § 103(a); and claim 7 pursuant to 35 U.S.C. § 112 ¶ 2.

On July 30, 2001, Appellant responded to the Office Action, amending the title, drawings, and specification, and amending claims 1, 3, 4, 6, 8-14, and 16-18. New claim 19 was added,² and claims 2, 5, and 7 were cancelled. Appellant additionally presented detailed arguments regarding the differences between the invention and the cited references.

On July 31, 2001, Appellant submitted a supplemental amendment in which “new” claim 19 was further amended.

² It appears that the designation of the new claim as “19” was in error, as a claim 19 had been previously presented for prosecution but subsequently withdrawn. This claim should have been designated “22”. Curiously, it appears this new claim was neglected until July 5, 2002, in which it was addressed for the first time in the Office Action of that date.

On January 14, 2002, the Office issued an Office Action made final, rejecting claims 1, 3, 4, 6, and 8-18 pursuant to 35 U.S.C. § 103(a) and claims 12 and 13 pursuant to 35 U.S.C. § 112 ¶ 2.

On February 27, 2002, Appellant responded to the Office Action, amending claims 1, 4, 12, and 14.

On March 7, 2002, the Office issued an Advisory Action, noting that the claim amendments submitted February 27, 2002 raised new issues requiring further search and/or consideration, as well as potentially introducing new matter.

On April 15, 2002, Appellant filed a Request for Continued Prosecution Application.

On July 5, 2002, the Office issued an Office Action, rejecting claims 1, 3, 4, 5, 8-18, and 22³ pursuant to 35 U.S.C. § 103(a), and rejecting claims 1, 3, 4, 6, 8-18, and 22 pursuant to 35 U.S.C. § 112 ¶¶ 1 and 2.

On October 7, 2002, Appellant responded to the Office Action, amending the title and specification, and amending claims 1, 4, and 12. Appellant additionally presented detailed arguments regarding the differences between the invention and the cited references.

On January 29, 2003, the Office issued an Office Action, rejecting claims 1, 3, 4, 6, 8-18, and 22 pursuant to 35 U.S.C. § 112 ¶¶ 1 and 2, and rejecting claims 1, 3, 4, 6, and 8-18 pursuant to 35 U.S.C. § 103(a).

³ Formally “new” claim 19.

On July 29, 2003, Appellant responded to the Office Action, canceling claim 12 and amending claims 1, 3, 4, 6, 8-11, and 13-17. Appellant additionally presented detailed arguments regarding the differences between the invention and the cited references.

On October 21, 2003, the Office issued an Office Action made final, again rejecting claims 1, 3, 4, 6, 8-11, 13-18, and 22 pursuant to 35 U.S.C. § 112 ¶ 2, and rejecting claims 1, 3, 4, 6, 8-11, and 13-18 pursuant to 35 U.S.C. § 103(a).

On February 12, 2004, Appellant responded to the Office Action made final, amending claims 1, 3, 4, 6, 10-11, 14-15, 17-18, and 22. Appellant additionally presented detailed arguments regarding the differences between the invention and the cited references.

On March 16, 2004, the Office issued an Advisory Action, noting that the claim amendments submitted February 12, 2004 raised new issues requiring further consideration and or search.

On April 19, 2004, Appellant filed a Request for Continued Examination.

On July 15, 2004, the Office again stated the claims were subject to further restriction, requiring election for prosecution purposes between Group I, consisting of claims 1, 3, 4, 6, 8-11, and 13, and Group II, consisting of claims 14-18, and 22.

On August 16, 2004, Appellant responded to the election/restriction requirement and elected Group I with traverse, further arguing and requesting reconsideration and withdrawal of the election/restriction requirement as unnecessary in light of the previous prosecution and search conducted.

On December 16, 2004, the Office issued an Office Action making the restriction final and rejecting claims 1, 3, 4, 6, 8-11, and 13 pursuant to 35 U.S.C. § 112 ¶¶ 1 and 2, and further objecting to the drawings and specification. Rejections pursuant to 35 U.S.C. § 103 were not asserted in light of the section 112 rejections. The Office further noted that the lack of a rejection should not be considered to avoid the prior art of record.

On March 16, 2005, Appellant filed an amendment and response, amending the specification and amending claims 1 and 6. Appellant further provided detailed arguments regarding the differences between the invention and the prior art.

On August 24, 2005, the Office issued an Office Action made final, again rejecting claims 1, 3, 4, 6, 8, 9, and 13 pursuant to 35 U.S.C. § 103(a) and objecting to the drawings as failing to disclose the “laminar member.” Unclear in this Office Action is whether the rejections pursuant to 35 U.S.C. § 112 ¶¶ 1 and 2, were successfully traversed.⁴

On November 10, 2005, a telephonic interview was held between the Examiner and counsel for Appellant. Regarding the objection to the drawings, Examiner asserted that the term “laminar” has the ordinary meaning of more than one layer in the closure art, requiring such

⁴ The Examiner rejected various claims under §112 ¶1 for failing to disclose the cap having a laminar member from which the skirt depends while at the same time objecting to the drawings under Rule 1.83(a) stating that the laminar member must be shown in the drawings or canceled from the claims. In a response to Office Action filed March 16, 2005 and with ample support in the specification, Appellant amended the specification to more particularly point out that the laminar member is a circular disc having an annular skirt depending therefrom. In the Office Action dated August 24, 2005 maintained her objection. Subsequently, the Examiner stated in her Answer (June 16, 2006) to Appellant's first Appeal Brief (March 23, 2006) stated that there were no pending rejections under §112, ¶¶ 1 or 2.

illustration in the drawings or cancellation of those claim elements that rely upon such disclosure.

On December 21, 2005, Appellant filed a response, addressing the objection to the drawings, specifically regarding the Examiner's interpretation of the term "laminar" and its effect on the drawings. Appellant additionally presented detailed arguments regarding the differences between the invention and the cited references.

On January 9, 2006, the Office issued an Advisory Action, denying Appellant's request for reconsideration.

On January 23, 2006, Appellant filed a Notice of Appeal appealing the rejections of the Office Action made final dated August 24, 2005 as well as the rejections pursuant to 35 U.S.C. § 112 ¶¶ 1 and 2 detailed in the Office Action dated December 16, 2004. This Notice of Appeal was received by the Office on January 23, 2006.

On March 23, 2006, Appellant filed an Appeal Brief.

On June 16, 2006, the Examiner filed an Answer to Appellant's Appeal Brief.

On August 16, 2006, Appellant filed a Reply Brief responding to the Examiner's Answer. Appellant also filed a Request for Oral Hearing concurrently with the Reply Brief.

On April 23, 2007, the Board of Patent Appeals and Interferences issued a Decision on Appeal reversing the rejection of claims 1, 3, 4, 6, 8-11, and 13 under 35 U.S.C. § 103.

On May 22, 2007, a telephonic interview was held between the Examiner and counsel for Appellant. During the interview, the Examiner made a request for a corrected declaration to correct the claim for foreign priority and the statement regarding the “duty to disclose.”

On May 29, 2007, Appellant filed an Information Disclosure Statement citing new art for the Examiner’s consideration.

On July 13, 2007, Appellant submitted a supplemental declaration that included the “duty to disclose” statement and a corrected claim of priority.

On August 16, 2007, the Office issued an Office Action made final, rejecting claims 1, 3, 6, 9, 10, and 13 pursuant to 35 U.S.C. § 102(b) and claims 1, 3, 4, 6, 8-11, and 13 pursuant to 35 U.S.C. § 103(a).

On October 31, 2007, Appellant filed a Request for Continued Examination and response to Office Action. Appellant cancelled claims 14-18 and 22 and presented detailed arguments regarding the differences between the invention and the cited references.

On January 11, 2008, the Office issued an Office Action made final, again rejecting claims 1, 3, 6, 9, 10, and 13 pursuant to 35 U.S.C. § 102(b) and claims 1, 3, 4, 6, 8-11, and 13 pursuant to 35 U.S.C. § 103(a).

On April 10, 2008, Appellant filed a Notice of Appeal appealing the rejections of the Office Action made final dated January 11, 2008. The Notice of Appeal was received by the Office on April 10, 2008. Appellant also filed a Pre-Appeal Brief Request for Review requesting

that the rejections of claims 1, 3, 4, 6, 8-11 and 13 be withdrawn and the application proceed to allowance.

On May 21, 2008, the Office issued a Notice of Patent Decision from Pre-Appeal Brief Review maintaining the rejections of claims 1, 3, 4, 6, 8-11, and 13.

B. *Rejection of claims 1, 3, 6, 9, 10, and 13 pursuant to 35 U.S.C. § 102(b).*

Claims 1, 3, 6, 9, 10, and 13 have been rejected pursuant to 35 U.S.C. § 102(b) as being anticipated by *Sekiguchi et al.*, Japanese Patent No. 62-122962. Anticipation requires that each and every element of the claim be found in a single prior art reference. *Connell v. Sears, Roebuck & Co.*, 722 F.2d 1542, 1548 (Fed. Cir. 1983); *Atlas Powder v. E.I. du Pont*, 750 F.2d 1569, 224 USPQ 409 (Fed. Cir.1984). *Sekiguchi et al.* fail to disclose all the limitations of the claimed invention, and, therefore, cannot and do not anticipate the present invention. Appellant respectfully requests that the Office rejections pursuant to 35 U.S.C. § 102(b) be reversed and a Notice of Allowance be issued.

The present invention generally provides for an apparatus comprising a closure of an open-ended container, and an open-ended container, the container assembly comprising:

- (i) a flexible membrane for closing the open end of the container;
- (ii) an adhesive seal between the flexible membrane and the container;
- (iii) a rigid cap having a resiliently deformable member juxtaposed to the flexible membrane such that when the cap is in use, the flexible membrane is pressed against the container in the vicinity of the seal, thereby reinforcing the seal sufficiently to withstand high pressures which are generated from cooking the contents of the container;

(iv) the rigid cap further having a first cam and follower pair, which when in use is engaged with a second cam and follower pair located on the container neck, relative movement between the first and second cam and follower pairs in a predetermined direction causes the rigid cap and the container neck to approach one another, thereby increasing the pressure exerted by the resiliently deformable member on the flexible membrane; and

(v) the rigid cap further having a laminar member and an annular skirt, the skirt extending downwardly from the laminar member, and the second cam and follower pair is secured on an upper wall of the skirt,

wherein the laminar member is spaced from the flexible membrane by a distance less than the maximum possible extension of the flexible membrane towards the laminar member.

1. *Sekiguchi et al.* fail to disclose one or more of the limitations of the claims, and thus, do not anticipate the claims under 35 U.S.C. §102(b).

In the January 11, 2008 Office Action made final (the “January 11, 2008 Final Rejection”), the Examiner states that *Sekiguchi et al.* disclose “a container assembly comprising a container 1 having a second cam and follower pair, a flexible membrane 2, an adhesive seal between the flexible membrane and the container, a rigid cap 3 having a resilient deformable member 5 juxtaposed to the flexible membrane, a first cam and follower pair, a laminar member and annular skirt depending from the laminar member, *wherein the laminar member is spaced from the flexible membrane by a distance less than the maximum possible extension of the flexible membrane toward the laminar member.*” However, Appellant submits that the Final Rejection is erroneous because at least one of the recited limitations is not disclosed by *Sekiguchi et al.*

Appellant maintains that *Sekiguchi et al.* do not disclose that “the laminar member is spaced from the flexible membrane by a distance less than the maximum possible extension of the flexible membrane towards the laminar member.” The Examiner states in the Final Rejection:

FIG 1 depicts the rigid cap attached to the container with an airspace between the flexible membrane 2 and the rigid cap 3. The fourth paragraph on page 4 discloses the expansion and contraction of the airspace 4 prevents rupture of the flexible membrane. The airspace is contracted and expanded by movement of the flexible membrane. It can be *seen* [from FIG. 1] that the lowermost point of the laminar member is spaced from the flexible membrane by a distance less than the maximum possible extension of the flexible membrane towards the laminar member.

However, the claimed limitation cannot be *seen* from FIG. 1 as stated by the Examiner. Drawings in a prior art patent can anticipate claims if they clearly show the structure which is claimed. However, the drawing must show all the claimed structural features. Importantly, proportions of features in a drawing are not evidence of actual proportions when drawings are not to scale. MPEP §2125. “It is well established that patent drawings do not define the precise proportions of the elements and may not be relied on to show particular sizes if the specification is completely silent on the issue.” *Hockerson-Halberstadt, Inc. v. Avia Group Int’l*, 222 F.3d 951, 956, 55 USPQ2d 1487, 1491 (Fed. Cir. 2000). Seemingly to cure the deficiency of the specification being silent, the Examiner states that the specification does indeed disclose the claimed limitation. “The fourth paragraph on page 4 [of *Sekiguchi et al.*] discloses the expansion and contraction of the airspace 4 prevents rupture of the flexible membrane.” Page 2, January 11, 2008 Final Rejection.

However, a plain reading of the excerpt relied upon by the Examiner from *Sekiguchi et al.* fails to disclose the claimed limitation:

If a sealed container that is in the state shown in Fig. 1 is subjected to heat sterilization at 90°C or above or retort sterilization at 110-120°C, the internal pressure of the said air layer and the internal pressure of the glass container are balanced relatively easily through the expansion and contraction of the air layer present inside airtight space (4) and therefore no particularly great force is applied to inner cap (2) and its heat seal part and consequently the seal is not broken.

Sekiguchi et al., page 4, paragraph 4.

Indeed, when this case was first appealed to the Board of Patent Appeals and Interferences, the Board in its April 23, 2007 Decision stated that “[s]ince patent drawings are not drawn to scale one cannot determine any details about the spacing except that a space exists.” BPAI Decision, April 23, 2007, page 5, lines 8-11.

As explained in Appellant’s October 31, 2007 Response, *Sekiguchi et al.* disclose that a space exists between the cap and the flexible membrane. However, *Sekiguchi et al.* do not disclose the precise relationship between the laminar member and the flexible membrane, i.e. that the “laminar member is spaced from the flexible membrane by a distance less than the maximum possible extension of the flexible membrane towards the laminar member.” The Final Rejection fails to recognize that the foregoing limitation is not disclosed by *Sekiguchi et al.* and cannot be *seen* in FIG. 1.

Based on the foregoing, Appellant respectfully requests that the rejection of claims 1, 3, 6, 9, 10, and 13 under 35 U.S.C. § 102(b) be reversed and a Notice of Allowance be issued.

C. *Rejection of claim 8 pursuant to 35 U.S.C. § 103(a) as being unpatentable over Sekiguchi et al.*

Claim 8 has been rejected pursuant to 35 U.S.C. § 103(a) as being unpatentable over *Sekiguchi et al.*, Japanese Patent No. 62-122962. In particular, the Examiner states that *Sekiguchi et al.* disclose the claimed container except for the resiliently deformable member comprising a foamed material. The Examiner concludes that it would have been obvious to one

of ordinary skill in the art to form the resiliently deformable member of a foamed material as a matter of obvious design choice.

As previously discussed in the October 31, 2007 Response, if a reference does not disclose the limitation in an independent claim, the claims depending therefrom are not obvious in view of the same reference. MPEP §2143.03. With regard to independent claim 1, *Sekiguchi et al.* do not disclose, teach, or suggest that the “laminar member is spaced from the flexible membrane by a distance less than the maximum possible extension of the flexible membrane towards the laminar member.” Therefore, *Sekiguchi et al.* alone cannot make obvious a resiliently deformable member comprised of a foamed material secured to the rigid cap. Consequently, the rejection of claim 8 as being unpatentable over *Sekiguchi et al.* should be withdrawn.

D. *Rejection of claim 11 pursuant to 35 U.S.C. § 103(a) as being unpatentable over Sekiguchi et al. in view of Hardt.*

Claim 11 has been rejected pursuant to 35 U.S.C. § 103(a) as being unpatentable over *Sekiguchi et al.*, Japanese Patent No. 62-122962, in view of *Hardt*, U.S. Patent No. 4,328,905. In rejecting claim 11, the Examiner states that *Sekiguchi et al.* teach the claimed closure except for a pull tab hingedly attached to the membrane, while *Hardt* teaches a membrane closure having a pull tab hingedly attached thereto. The Examiner concludes that it would have been obvious to one of ordinary skill in the art at the time the invention was made to apply the teaching of a hingedly attached pull tab to the membrane of *Sekiguchi et al.*, the motivation being

to provide a graspable member to allow for easy removal of the membrane from a container mouth.

If a reference does not disclose each and every limitation in an independent claim, then claims depending therefrom are not obvious in view of the same reference. MPEP §2143.03. With regard to independent claim 1, *Sekiguchi et al.* do not disclose, teach, or suggest that the “laminar member is spaced from the flexible membrane by a distance less than the maximum possible extension of the flexible membrane towards the laminar member.” Furthermore, *Hardt* does not disclose, teach, or suggest this missing limitation. As a result, the combination of *Sekiguchi et al.* in view of *Hardt* does not make a lifting tab hingedly secured to the flexible member obvious. Consequently, the rejection of claim 11 as being unpatentable over *Sekiguchi et al.* in view of *Hardt* should be withdrawn.

E. *Rejection of claims 1, 3, 4, 6, 8-10, and 13 pursuant to 35 U.S.C. § 103(a) as being unpatentable over Hiroshi in view of Sekiguchi et al.*

Claims 1, 3, 4, 6, 8-10, and 13 have been rejected pursuant to 35 U.S.C. § 103(a) as being unpatentable over *Hiroshi*⁵, Japanese Patent No. 6-219464, in view of *Sekiguchi et al.*, Japanese Patent No. 62-122962. Appellant submits that the Final Rejection is erroneous in its assertion that claims 1, 3, 4, 6, 8-10 and 13 are unpatentable under 35 U.S.C. §103(a) over *Hiroshi* in view of *Sekiguchi et al.*

⁵ An English translation of *Hiroshi* was filed by Appellants in response to a non-final Office Action dated February 28, 2001. Appellants filed its response on July 7, 2001. All references to paragraph numbers of *Hiroshi* in this Appeal Brief are made in reference to the English translation.

The Board of Patent Appeals and Interferences has already determined that *Hiroshi* alone does not make the claimed invention obvious. BPAI Decision, April 23, 2007. The Final Rejection acknowledges this. Final Rejection, page 4, lines 5-7. However, the Final Rejection states that all of the claimed limitations are disclosed by *Hiroshi* and it is known from *Sekiguchi et al.* to provide a container assembly in which the laminar member is spaced from the flexible membrane by a distance less than the maximum possible extension of the flexible membrane toward the laminar member to provide a container liner seal that is less likely to rupture due to pressure within the sealed container. Appellant again suggests that no such limitation is disclosed or suggested by *Sekiguchi et al.* and thus it would not be obvious to one of ordinary skill in the art to combine *Sekiguchi et al.* with *Hiroshi* to achieve the claimed invention.

1. *Sekiguchi et al.* fail to disclose or contemplate the claimed spatial relationship between the laminar member and the flexible membrane.

As discussed in detail above, an important feature of the invention as claimed in independent claim 1 is that the laminar member is spaced from the flexible membrane by a distance less than the maximum possible extension of the flexible membrane towards the laminar member. The claimed feature is particularly adapted for use in the continuous mass production of canned food products in which food is placed within the can in an *uncooked* or *partially cooked* state. Because food cooks in the can, pressure builds up within the can such that there is a higher pressure within the can than outside the can. This pressure differential will tend to cause the membrane (identified by reference numeral 11 in the figures) to extend towards the closure of the container assembly.

As disclosed by Appellant, the stretching of membrane 11 that occurs during the cooking of food products in can 10 is accommodated by expansion of member 11 towards disc 21. Paragraph 0053, U.S. Publication 20020125249. Because the laminar member (identified by reference numeral 21 in the figures) is spaced from the flexible membrane by a distance which is less than the maximum possible extension of the flexible membrane towards the laminar member, the flexible member will be pre-stressed when the rigid enclosure is in place. This in turn means that the flexible member will always exert pressure on the seal between the flexible member and the container, thus reinforcing the seal. Additionally, the stretching of the flexible member (which is limited by the space in between the flexible member and the laminar member) helps to prevent overstretching of the flexible membrane which could lead to failure of the flexible membrane.

Appellant submits that *Sekiguchi et al.* disclose that an air space exists between the cap top wall and the flexible membrane.

If a sealed container that is in the state shown in Fig. 1 is subjected to heat sterilization at 90°C or above or retort sterilization at 110-120°C, the internal pressure of the said air layer and the internal pressure of the glass container are balanced relatively easily through the expansion and contraction of the air layer present inside airtight space (4) and therefore no particularly great force is applied to inner cap (2) and its heat seal part and consequently the seal is not broken.

Sekiguchi et al., page 4, paragraph 4.

However, Appellant also contends that *Sekiguchi et al.* does not disclose any particular details about the airspace, only that it can be made bigger.

FIG. 2 shows inner cap (2) in which central part (7) projects downwards. In this case, airtight space (4) can be made bigger than that in the sealed container shown in FIG. 1 and therefore it can withstand larger variation in pressure.

Sekiguchi et al., page 4, paragraph 5.

Thus, if the container is required to withstand higher pressures, then *Sekiguchi et al.* require that the space 4 in the closure of the container must be made bigger in order to withstand larger variations in pressure. However, there is no disclosure in *Sekiguchi et al.* that suggests the very precise relationship between the laminar member and the flexible membrane, namely that the laminar member must be spaced from the flexible membrane by a distance less than the maximum possible extension of the flexible member towards the laminar member. As a result, *Sekiguchi et al.* do not disclose nor make obvious the very precise relationship between the laminar member and the flexible member claimed by Appellant.

The Final Rejection states that the flexible membrane of *Sekiguchi et al.* can clearly deflect in a direction opposite that which is shown and since the laminar member includes a downwardly projecting indented portion that protrudes into the air space, the distance between this portion of the laminar member and the flexible membrane is less than the distance between the central portion of the laminar member and the flexible membrane. Appellant contends that the Final Rejection impermissibly relies on hindsight gleaned from Appellant's disclosure and claimed limitation and is reading Appellant's claimed limitation into drawings that are not drawn to scale.

2. Because *Sekiguchi et al.* fail to disclose or suggest the claimed spatial relationship between the laminar member and the flexible membrane, *Hiroshi* in view of *Sekiguchi et al.* cannot make the claimed invention obvious.

The Board of Patent Appeals and Interferences (BPAI Decision, April 23, 2007), the Examiner (Final Rejection, page 4, lines 5-7) and the Appellant all concede that *Hiroshi* does not

disclose or make obvious the claimed spatial relationship between the laminar member and the flexible membrane. As discussed above, *Sekiguchi et al.* disclose an airspace but is silent about the precise spatial relationship between the laminar member and the flexible membrane. *Sekiguchi et al.* merely states the airspace can be made bigger. Therefore, one of ordinary skill in the art would not be motivated to combine *Hiroshi* and *Sekiguchi et al.* because one skilled in the art would need to conduct endless experimentation of an infinite number of spacing possibilities with no reasonable expectation of success of hitting the precise spatial relationship claimed by Appellant. “Obvious to try” is not the standard by which obviousness is measured. A prior art suggestion for virtually endless experimentation does not make a prima facie case of obviousness. *In re Dow Chemical Co.*, 837 F.2d 469, 473, 5 USPQ2d 1529, 1532 (Fed. Cir. 1989). Appellant claims a very precise limitation that is neither suggested nor made obvious by the theoretical combination of *Hiroshi* and *Sekiguchi et al.* as stated in the Final Rejection.

Accordingly, a *prima facie* case of obviousness has not been made, and Appellant respectfully requests that the rejection over *Hiroshi* in view of *Sekiguchi et al.* be withdrawn.

F. *Rejection of claim 11 pursuant to 35 U.S.C. § 103(a) as being unpatentable over Hiroshi in view of Sekiguchi et al., and further in view of Hardt.*

Claim 11 has been rejected pursuant to 35 U.S.C. § 103(a) as being unpatentable over *Hiroshi*, Japanese Patent No. 6-219464, in view of *Sekiguchi et al.*, Japanese Patent No. 62-122962, and further in view of *Hardt*, U.S. Patent No. 4,328,905.

If a combination of references does not disclose each and every limitation in an independent claim, then the claims depending therefrom are not obvious in view of the same

references. MPEP §2143.03. With regard to independent claim 1, the combination of *Hiroshi* in view of *Sekiguchi et al.* does not disclose a very precise limitation that requires the laminar member to be “spaced from the flexible membrane by a distance less than the maximum possible extension of the flexible membrane towards the laminar member.” Furthermore, *Hardt* does not disclose, teach, or suggest this missing limitation. As a result, the combination of *Hiroshi*, *Sekiguchi et al.*, and *Hardt* does not make a lifting tab hingedly secured to the flexible member obvious. Consequently, the rejection of claim 11 as being unpatentable over *Hiroshi* in view of *Sekiguchi et al.* and *Hardt* should be withdrawn.

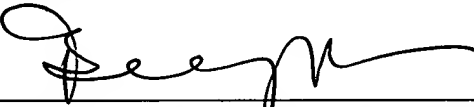
(8) CONCLUSION

Pending claims 1, 3, 6, 9, 10, and 13 remain rejected pursuant to 35 U.S.C. § 102(b), while pending claims 1, 3, 4, 6, 8-11, and 13 remain rejected pursuant to 35 U.S.C. § 103(a). Appellant respectfully asserts that the Examiner has not established the existence of a *prima facie* case of anticipation, nor has the Examiner established the existence of a *prima facie* case of obviousness. Appellant respectfully requests that the Board of Patent Appeals and Interferences reverse the Examiner’s decisions on all counts.

Appellant has submitted herewith a petition for a two-month extension of time, the statutory period for filing this Appeal Brief having expired on June 21, 2008 and this Appeal Brief being filed on or before August 21, 2008. The Commissioner is hereby authorized to charge or credit any such fees or overpayment to Deposit Account No. 50-1901 (Reference – 350013-000065). If any additional fees are required for filing this Appeal Brief, the Commissioner is also authorized to charge the aforesaid Deposit Account No.

Date: August 21, 2008

Respectfully submitted,

By 

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(A) CLAIMS APPENDIX

1. (Previously Presented) A container assembly comprising a closure for an open-ended container, and an open-ended container, the container assembly comprising:

- (i) a flexible membrane for closing the open end of the container;
- (ii) an adhesive seal between the flexible membrane and the container;
- (iii) a rigid cap having a resiliently deformable member juxtaposed to the flexible membrane such that when the cap is in use, the flexible membrane is pressed against the container in the vicinity of the seal, thereby reinforcing the seal sufficiently to withstand high pressures which are generated from cooking the contents of the container;

- (iv) the rigid cap further having a first cam and follower pair, which when in use is engaged with a second cam and follower pair located on the container neck, relative movement between the first and second cam and follower pairs in a predetermined direction causes the rigid cap and the container neck to approach one another, thereby increasing the pressure exerted by the resiliently deformable member on the flexible membrane; and

- (v) the rigid cap further having a laminar member and an annular skirt, the skirt extending downwardly from the laminar member, and the second cam and follower pair is secured on an upper wall of the skirt,

wherein the laminar member is spaced from the flexible membrane by a distance less than the maximum possible extension of the flexible membrane towards the laminar member.

2. (Cancelled)

3. (Previously Presented) A container assembly according to Claim 1 wherein the first and second cam and follower pairs include co-operating screw threads formed respectively on the container neck and the rigid cap.

4. (Previously Presented) A container assembly according to Claim 1 further having an annular flange, the resiliently deformable member is substantially congruent with the flange, and wherein the rigid cap is in place over the container, the resiliently deformable member presses the flexible membrane against the flange.

5. (Cancelled)

6. (Previously Presented) A container assembly according the Claim 1 wherein the laminar member is a circular disc, and the skirt extends from the outer periphery thereof.

7. (Cancelled)

8. (Previously Presented) A container assembly according to Claim 1 wherein the resiliently deformable member comprises a foamed material secured to the rigid cap.

9. (Previously Presented) A container assembly according to Claim 1 wherein the flexible membrane comprises a metal foil adhesively securable on the container neck.

10. (Previously Presented) A container assembly according to Claim 4 wherein the rigid cap is shaped for use with the container neck which is generally cylindrical in shape.

11. (Previously Presented) A container assembly according to Claim 1 including a lifting tab hingedly secured to the flexible membrane and is comprised of the same material as that of the flexible membrane.

12. (Cancelled)

13. (Previously Presented) A container assembly according to Claim 1 wherein the rigid cap supports the body of the can in a radial direction.

14-22. (Cancelled)

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(B) EVIDENCE APPENDIX

None

(C) RELATED PROCEEDINGS APPENDIX

None

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